CASE OF RECORDER MORRIS.

Opinion of Willis Hall, Attorney General, on the legality of the conduct of Robert H. Morris, Re-

order of the City of New-York. ATTORNEY GENERAL'S OFFICE, Albany, January II, 1841.

—I have the honor to acknowledge the receipt of your Ex)'s communication, together with a copy of the charge of
the Morris, Esq. Recorder of the city of New York, to the
Jury of that County, delivered in November 18st,
attention is particularly directed to the portion of the charge
to the Recorder details the manner in which the testimony taken
the examining magniferation in a charge against James B. Gent

Idea to the right of the Recorder to sit as an examining in magistrate, any more than there is of the right of a upreme Court, although it is unusual for either to act y, and in case of the Recorder, or of any other judge he accused in case he is indicted, it is not, perhaps, for

charge that the examination was inquisitorial, is equally un-it, provided it was conducted in good faith. If the true intent ascertain whether there were reasonable grounds to believe autworth was guilty of the crime imputed to him, and none but

being charged as criminals, and compared to their own conduct, rather than to that of Glentworth, then investigation is clear violation of the great principle which

trippears by the Recorder's statement, that the testimony taken, fore him, as the examining magnetate, was published as it was seen from day to day, in the public journals, with his knowledge and nevat, and in some degree, under his superintendence.

The common law, in its humane and politic waterfulness to guardenness that the superintendence with the common law, in its humane and politic waterfulness to guardenness that the superintendence with the lay, gives to every one who is accused of a crime, the advantage of a triple.

e first is before the Grand Jury, and is merely a secret, exparte sition, to ascertain if there be sufficient evidence to justify their ag the charge public, and putting the accused upon his defence

sexing the charge public, and periods the country.

The second is before the Petit Jury, where the prisoner is called pour to deny the charge, and is heard in his defence. The first is seried, the second is public.

Examinations before magistrates are not trials. The evidence is examinations before magistrates are not trials. The evidence is out given for the purpose of establishing the guilt or innocence of the reused, but merely to enable the magistrate to exercise a proper discretion in discharging, committing, or holding him to bail. This premium recommendation is rendered necessary only because the Grand language and always in session. When in session, the proofs and

minary examination is rendered necessary only occase the trans-ury is not always in session. When in session, the proofs and barges may be sent directly before it.

But the evidence, when taken before the Grand Jury, is required to be kept secret. Is it proper, thou, that the same testimony should annecessarily be made public by the committing magistrate?

The grand jurors are sworn to secreey, and not allowed to duclose be evidence given before them, except in certain cases specified in

the evidence given before them, except in certain cases specified in the statute, 2 R. S. 724 (3).

There is no positive statute requiring the examinations before the magistrates to be conducted privately; but their strong analogy to the inquest taken before the Grand Jury, indicates very pointedly the great impropriety of any unusual and unnecessary publication injures the innocent, and enables the guilty to escape. If the practice is allowed, the unprincipled, the revengeful, the malicious will be induced to use the magistrates as a safe and convenient medium for conveying their slanders to the public. It is a matter of notoriety that in this case, as usually happens, testimony was given only on one side. The sense of justice must be glimmering indeed, in that magistrate who can wantouly niace those loose, unexplained, unsified, exparte, and (for

ee must be glimmering indeed, in that magistrate who can wanr place those loose, unexplained, unsifted, ex parte, and (for
the knows) perjured statements before the world,
in Recorder says he thought he discovered a conspiracy ining many wealthy and powerful men, a sonspiracy to carry an
on by fraud, a crime of the deepest offence known to the laws,
is in effect treason against the sovereignty of the people, a crime
tures all the power and ingenuity and energy of the Legislature
he Courts to check. Under these circumstances and deeply imed (as the Recorder represents himself to have been) with their
trance, it was an act of unaccountable imprudence to publish the portaine, it was an act of unaccountable imprudence to publish the portaine, it was an act of unaccountable imprudence to publish the timony in the newspapers before the conspirators were all distinguished and arrested, thus giving them an opportunity to fice from tice, to suppress testimony and tamper with the witnesser. It may like that to this rery cause it is owing that the Grand Jury were able to find an indictment in this case for want of evidence. The

indicious course to make known the evidence while any of the parties, implicated are st large."

The Recorder says he thought it necessary to examine the without the tostimony of the witness of to-day is read by those who are to become the witnesses of to-morror!

The investigation too was an extraordinary produce excitement and be attributed to party motives and conducting it. The Recorder states that he was charged with acting from political motives, and that it was said that he intended to update the target with the statement in the injection of private rights, that they should in all cases implicated are st large."

All to the protection of private rights, that they should in all cases implicated are st large."

The Recorder says he thought it necessary to examine the with protection of private rights, that they should in all cases they are supported by oath. It is not so to improve the their opinion? The state of improvements for any place or size and that if not so to the power for the by warrant supported by out the size of indirights, and search says place of indirights. But if this 'controlling principle of the common law' as to that the wind, the right that the provided to do what they judge extra place is the their dot size, that the size of minding t ing from political motives, and that it was said that he intended D publish the testimony in order to affect the approaching election. Can it be attributed to a mere mistake in judgement, that with these warnings before him he proceeded to verify these charges and convert-suspicion into certainty, by making the very publication which complains his political opponents predicted! Nor is it wonderful after this that the expressions of contempt and disrespect of the Court, which the Recorder complains of; should have been heard. ofter this that the expressions of contempt and disrespect of the Court, which the Recorder complains of, should have been heard. So unusual a course, calculated to injure the character of innocest persons, and prejudice the accused on his trial, and suspected, perhaps unjustly, of a political moties, and having apparently a political bearing, must inevitably degrade the Court in the estimation of the people, and bring the laws into contempt. Even in trials before the Jury which are by law and in their nature public, when the accused is present with his counsel and his witnesses to cross-etamine and explain and disprove, in exciting causes, and when other trials for the explain and disprove, in exciting causes, and when other trials for the explain and disprove, in exciting causes, and when other trials for the explain and do so against the direction of the Court, has been held a contempt and a misdemeganor. In the trial of Thistiewood and large for high treason, one Clement was fixed £500 for publishing the proceedings of the trial, contrary to the order of the Court. On application, the Court refused to remit the fixe. They say "the necessary of keeping the testimony of witnesses concealed from particularly on such trials as these where the same exidence must decreasarily be given in such case when the same exidence must decreasarily be given in such case almost rerbutim, and of which advantage may be taken either to the under favor or prejudice of the prisoner," I R and A. 218. How under favor or prejudice of the prisoner," I R and A. 218. How under favor or prejudice of the prisoner, "I R and A. 218. How under favor or prejudice of the prisoner," I R and A. 218.

went to the house of Mr. Pierce, in our official characters, and rule requiring the hinded of him the said papers. Mr. Pierce informed us that he the inspection of the bundle of papers, which Glentworth informed him related to Purcell, the vice-chain assections which were under investigation before the Recorder, court-hould great the

and no principle of general law, which makes it the duty of the Mayor pere against his client, and that and Recorder to search the houses of citizens, under any pretence client, he ought, immediately us whatever. The right of search may exist, as it certainly does by cum, to have delivered them up

one he has to suspect the goods concealed in such a

A similar case under the same statute, is reported, 3 Wil, 81, Brace vs. Rawlin, et al. in which the jury gave £100 damages, shihough no damages in fact were proved, and a motion was made to set aside the verdict. Chlef Justice Wilmot says, 'This is an unlawful entry into a man's house, which is his cast! it an invasion upon his wife and family, at peace and quietness therein, frighte of and surprised by these dependents.' 'They continue to go on and act against the subject in this illegal manner, and then come to this court and say. The damages are too large, we pray you reduce them.'

"For wown part, I am very clearly of opinion that this is one of mone, for asserting this very doctrine, which the Recorder says is the

mon law to enthr and search the house of a citizen, and that in the only cases, (these of stolen and uncustomed goods,) where authority is given by the statute, they do not consider it as the 'official duty' of

ony, and danger that the goods will be removed. 4 Burn, 131.

The ordinary form of a search warrant expresses on the face of it, that it is to be executed in the day time.

The only case in which our statute authorizes a search and seignre of papers, is when an officer refuses to deliver to his successor the books and papers of his office; and in that case, it expressly restrains the execution of the warrant to the day time. 1 R. S. 115, § 59.

So in case of stolen goods which is the only other one allowed, the statute restricts a night search to the single case in which there is positive proof that property has been stolen or embezzled and concealed in the particular house or place required to be searched. 2 R. S. 623, § 27. These venerable authorities, the form of the warrant, and the care-

ful provisions of the statutes, all show how important this restriction has always been held.

They show also that if this act had been done in the same manner They show also that it this act had been done in the same right under a warrant, it would not have been protected, but the officer as well as the accuser would have been a mere tre passer. And is it possible that an act done are keartant is entitled to more privilege than the same act done under and by virtue of a warant duly issued and supported by the oath of the accuser.

Admitting then that the right of search and serzure crists in this case. I am conveniend to the conclusions that the manner of its exercise.

and problems of a particle valence before attral was of itself algorithms are publication of explained his motives for this navel properties. The Recorder had not explained his motives for this navel properties. The Recorder had not explained his motives for this navel properties. The Recorder had not explained his motives for this navel properties and unprecedented but unavailable to the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is this possible of the publication of the law is the law is the publication of the law is the publication of the law is the law is the law is the publication of the law is the

the inspection of the Attorney General in an information against Dr.

That the warrant was a mere permission; that the officer according to the known laws and ancient customs of the realm, set

is not law." "To search, seize and carry away all the pa-he subject upon the first warrant. That such a right should sted from the time whereof the memory of man runneth not

the infamous Chief Justice Scroggs, ("that all persons that do write or print, or sell any pemphlet that is either scandalous to public or private persons, such books may be seized and the persons punished by

the common law have never been reduced to writing, and are not to be found in any book, is equally novel and antenable. Lord Camden mays, "The names and rights of public magistrates, their power and forms of proceeding, as they are settled by law, have been long since written, and are to be found in books and records."

The Recorder, therefore, who has exercised this power of search and secure of private papers, and declared his intention to continue to exercise it, is bound to show some precedent or authority in law for so doing, and this he has attempted to do.

so doing, and this he has attempted to do.

He cites several cuses, as 2 Stark, Rep. 284; I Leach 235; Warson's case, 2 Stark, 140, 137; Robinson's case for murder of Helen Jewett; Townsend's case of maining with sitrol. Lazarus' case for forcers; Phebe Ann Floor for murder; and he might have cited many more, where papers or other articles found on the persons or in the possession of the accused, have been used on their trial as evidence against them, without objection. If objection had been made the authority of the cases would have been the stronger. But why has not objection been made! Not because no body ever doubted right to search for and seize private papers, but because no body ever doubted that if the wize private papers, but because no looks ever doubted that if the evidence was pertinent and legal, the court, would not and could not and from each other is sometimes of the utmost consequence in the administration of justice, particularly on such trials as these administration of justice, particularly on such trials as these administration of justice, particularly on such trials as these administration of justice, particularly on such trials as these administration of justice, particularly on such trials as these the administration of justice, particularly on such trials as these the administration of justice, particularly on such trials as these the administration of justice, particularly on such trials as these the administration of justice, particularly on such trials as these the administration of justice, particularly of the coachies under the same exidence must decreasely and an administration of the prisoner, 4 R. and A. 21S. How under the particular referred to, is not authorized by any law. That it exhibits a dangerous warepation of power, of evil example, and of which advantage may be taken either to the summations taken before the committing magistrate. This principle was fully recognized in the cases of that it exhibits a dangerous warepation of power, of evil example, and the strength of particulars referred to, is not authorized by any law. That it exhibits a dangerous warepation of power, of evil example, and the strength of particulars referred to, is not authorized by any law. That it exhibits a dangerous warepation of power, of evil example, and the strength of the committing the technical and legal the coactive site of the desired that the foreign contained. And even if form a collavoral scenarios to exercise in the secretic damper of evil example, and the recurs of evil example, and the strength of the court records the technical and legal the coactive site of exercises in this secretic dots and the court records the papers were not only illegally obtained, but against the everte of the court is all the foreign the desired that the foreign that the record is an observable undersomed the court records in the desire that th

dicial proceedings, and the reasons given for it only aggravate the dicial proceedings, and the reasons given for it only aggravate the dicial proceedings, and the reasons given for it only aggravate the evidence against themselves and the main that 'no man shall be bound to accuse himself, has always been so religiously address to him which may been liken to his going in the night time, accompanied by the Mayor, been liken to his going in the night time, accompanied by the Mayor, been liken to his going in the night time, accompanied by the Mayor, been liken to his going in the night time, accompanied by the Mayor, and the interest of the shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly his an affect himself, he shall not answer thereto, although possibly him for the King, and ceased to be private for the King, and the place of transformation of th

The law has very carefully provided and prescribed the man- ! Recorde

Urinne.

threed, he may give parol evidence of talest contents.

The case of Rex vs. Watson and al. 2 T. R. 123, was an application for a criminal information for a libel consisting in a certain resolution.

The case of the United States vs. Britton, 12 Mason, 464, was a case of forged notes, remaining in the possession of the forger. The district stormes did not ask flustice. Story for a warrant to search and seize them, nor did he ask the venerable Judge to describe them had go and seize them himself. He simply desired to describe the notes generally in the indictinent, and be permitted, after notice to may also control, imprison or murder any one in the realm. It is permitted to the notes generally in the indictinent, and be permitted, after notice to

In the case of the I nited States vs. Aaron nutr, including the courts whose numbers are the very definition of a courts whose numbers are the very definition of a courts whose rights and duties are prescribed by the discretion of courts whose rights and duties are prescribed by the discretion of the United States, to produce a private letter, which was averred by the defendant to be in terral to be defence. Indeed it cannot be pretended, that there is any difference in the manner of bringing evidence, parol or written, before the court, in civil and in

and publishers of a seditions and treasonable paper entitled 'The North Briton, No. 45, &c.' and to apprehend and seize them and their papers, &c.' This warrant was decided by Lord Mansfield and all the judges, to be illegal and void for uncertainty in the designation of the person to be arrested. Leach vs. Money et al. 19 Howell's State Trials, p. 1076. The same point was also decided by Chief Justice Pratt, in Wilkes vs. Wood, p. 1166; and the Chief Justice declares in that case, speaking of the power to search for papers, "If such a power is truly invested in a Secretary of State, and he can delegate this power is certainly may affect the nerson and presents.

April, 1766, declaring general warrants to be illegal and void. And

case.

Lord Coke says, (4 Inst. 177.) "For justices to make warrants upon surmises for breaking in the houses of any subjects to search for felons or stolen goods, is against Magni Charta. For though commonly the houses and cottages of poor and base people be by such warrants searched, yet if it be lawful, the houses of any subject, be he never so great, may be searched upon such warrant upon bare surmises."

Lord Camden says, (19 State Trials, 1907.) "The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with."

Here is the authority of two mighty names, that the right of search was unknown to the common law in any case whatever.

The first record of search warrants for my thing but stolen goods, originated in the Court of Star Chamber in the time of Elizabeth. It was then first used to search for libels and unicensed books, and con-tinued to be so used until the abolition of that tyrannical and oppres-

tinued to be so used until the abolition of that tyrannical and oppressive court. (19 State Trials, 1969.)

Instances are found of the exercise of this power in the court of King's Beach, in trials for high treason, in the time of the Stuarts. Indeed, most of the judicial murders perpetrated by Jeffres and by Scrogs, were effected by means of private papers, found on breaking open drawers and trunks in possession of the victims. Such was the case of Algernon Salney, whom History, recording the verdict of Time, has pronounced 'a patriot' a philosopher, and a christian. He was tried by the exercishe Jeffres, and condenned and executed for high treason, and the principal evidence against him were certain private papers found in his closet, and seized by a warrant from the Secretary of Station about he assess that began shown, where the law forcets the evidence out of the owner's custody by process. There is no process against papers in in, and the principal evidence against him were certain private pa-re-found in his closet, and seized by a warrant from the Secretary of ate, in which he asserts the treasonable doctrine that the power of the King is derived from the people! (See trial of Algernon Sidney, 9)

Such was also the case of Edward Coleman, a Catholic pricet. His home was searched, his boxes and escriburs were broken open, and his papers seized, by virtue of a search warrantfrom the King's council. He was tried before Chief Justice Scroggs for high treason, and wentened to be hanged by the neck, and be cut down alive, his bowels burnt before his face, and his quarters severed, and his body disposed.

sisted (except that of the notoriously perjured. Titus Outes,) in certain of illetters bearing date several years before, violently taken from his possession, and which related exclusively to the advancement of the Catholic religion in England, (trul of Edward Coleman, 7 State Trials.) Soon after, William Ireland, Thomas Pickering and John Grove, Ca-holic pricets, were tried at the Old Bailey, before the same judicial

monster, Chief Justice Scroggs, and convicted and executed on the ne kind of evidence, obtained in the same violent and lawiess man-Many similar cases might be referred to in the reigns of Charles and Many similar cases mignifice referred to take region of charges and James, and many in latter times; but in no one of them was the question of the legality of the seizure of the papers made or discussed; of can any such case be found entil the great case of Entick vs. Carriedton, decided in the King's Bench in 1765, in which the seizure of Private papers was declared by all the judges to be illegal.

It is generally supposed that the celebrated John Wilkes first effec-tually resisted and defeated arbitrary power, in the execute of usurped right to issue these oppressive warrants.

But to the honor of the country be it said, this great abuse, so fatal to personal library.

may enter our houses when they please; we are commanded to per-mit their entry. Their menial servants may enter; and break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare susp without outh is sufficient."

The elder John Adams, then a young man, was present at this me-morable debate, and long after the storm of the revolution had sub-sided, he declared. I do say that Mr. Otis's oration against writs of assistance becaused to not this nation the breath of life. American in Such was the effect of the indignation of the people of Boston at this pulpable attempt upon their rights, that even Gov. Hutchiason.

then the Chief Justice, (the chosen instrument of a tyrant.) was compelled at that time to abandon the plan. At the close of the term he delivered his opinion as follows.

"The court has considered the subject of writs of assistance, and can see no foundation for such a writ. But as the practice in England is not known, it has been thought best to continue the question to the

tic. The next year being the second year of the reign of George III, the ministers of that king first exhibited their disposition to exercise arbitrary power by issuing a warrant to seize John Entick with his papers, as the author of a paper called 'The Monitor, or British Frecholder.' Soon after, Dryden Leach was seized as the publisher,

The principal point discussed and decided was the illegality of general warrants, in which the whole court, including Lord Manetield, in spite of his leauing towards arbitrary power, were usual-mous. The seizure of papers was only brought collaterally into view,

State Trials, 1961. Wilkes vs. Wood, bl. p. 1153.)

But in the case of Eutick the warrant was special, directing the arrest of John Eutick, and the seiture of his books and papers; and he brought his action of trespass against Carrington the officer making the seizure especially on that ground. And the main and important point discussed and decided in that case, was the very one involved in this inquiry—the legality of the seizure of private papers under any pretence whatever.

April, 1700, declaring general warrants to the power remained undis-yet according to the Recorder's doctrine, the power remained undis-turbed at this very time in every justice of the peace in England, to him, 'a character fertile in overy great and good qualification.' The ion delivered by him on that occusion is a masterly and irresisti law-und glowing with an houset, intrepid and ardeat love of liberty.

Frequent reference has already been had to the doctrines asserted

request reference has arready been had to the doctrines asserted in that opinion, but the subject may still be illustrated by additional extracts from that rich mine of authority. "The messenger," he says, "is commanded to seize the person described and to bring him with his papers to be examined before the Secretary of State. The power so assumed by the Secretary of State is an execution upon all the party's papers in the first instance. His house is stilled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing or

being encerned in the paper.

"This power so claimed by the Secretary of State, is not support. "This power so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but hanself. The great execu-tive hand of criminal justice, the lord chief justice of the court of King's Bench, chief justice Scrogge excepted, never having assumed

By the lows of England, every invasion of private property, he it ever so minute, is a trespass. No man can set his foot upon my ground without my brease, but he is liable to an action though the damage he nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass, and even treading upon the soil. If he admits the fact, he he bound to show, by way of justification, that some positive law has empowered or excused him.

"Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly

on; and the principal eridence against him were certain private paors found in his closet, and seized by a warrant from the Secretary of
state, in which he asserts the treasonable doctrine that the power of
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wearch in these cases to help forward the conviction.

Whether this proceeds from the gentleness of the law towards criminals, or from a consideration that such a power would be more permicious to the innocest than useful to the public, I will not say.

It is very certain that the law obligeth no man to accuse himself; "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusations, failing upon the innocent as well as the guilty, would be both cruck and unjust; and it sould seem that search for evidence is disallowed upon the same principle. There, too, the innocent would be confounded with the guilty."

upon the same principle.

If the principle of the inviolability of private papers took deep root in the brants of the friends of civil liberty in England and in America. While this cause was under discussion in the courts, the friends of the Constitution in the House of Common introduced a resolution declaring the seizure of private papers to be illegal. For two successive sessions nobly did they rally in support of this essential bulwark of personal security: but the power to seize private papers was considered as a jewpl of the Crown, and wooder felly did the King struggle for its preservation. Never was a measure more violently opposed, in and out of Parliament. The tory members were carried from their sick beds and called home from foreign parts to vote against this resolution. It was emphatically a struggle between the People and the Crown—between

right to issue these oppressive warrants.

But to the honor of the country be it said, this great abuse, so fatal to personal liberty, was first attacked and gloriously defeated in sour own free land. It was the spark which kindled our Revolution.

In [76], one of the Custom-house officers at Boston petitioned the Supreme Court of Judicature to grant them writs of assistance, to aid them in the execution of their duty, seconding to the usage of the Court of Exchequer in great Britain.

The effects of these writs of assistance was to suthorize a custom-house officer to search any house or place for uncustomed goods, and to command the assistance of any of His Najesty's officers, minimizers or subjects. 12 Car. 2 ch. 10, 13 and 14 Car. 2, ch. 11, § R.2.

The citizens of Boston protested against the legality of the court's insuing such a writs awas praved for.

It was not denied on the argument, that the court might issue, on oath and probable suspicion, special writs directed to special officers, and to search certain houses specially set furth in the writ for sown in the status I. The crowd and agitation of their sick beds and called home from foreign parts to vote against this resolution. It was enterprised from foreign parts to vote of the count of the Crown—betwoen the People and the Crown—betwoen the People and the Crown—betwoen the People and the Crown—betwoen the deciding a party, and Royal Bespotiam.

The excitement on the discussion of this resolution was unprecedented. On one of the occasions, a contemporary thus describes it:

The point was so great, that never were the eyes of manking the fixed upon their representatives. Indeed, I never saw more day.

The effects of these write of assistance of any of His Najesty officers, minimized upon their representatives. Indeed, I never saw more day.

The citizens of Boston protested against the legality of the court's fixed upon their representatives. Indeed, I never saw more day.

The citizens of Boston protested against the legality of the court's fixed upon

iled only by a majority of fourtoen.
"The crowd and agitation of the people about the House said